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Issue Date: 19 November 2004

CASE NO: 2003-LHC-00141
2002-LHC-01129

OWCP NO: 02-129947

In the Matter of

ERIC BJONNES,
Claimant

v.

JOHN PICONE, INC.

and

PICONE/MCCULLAGH, Joint Venture
Employers

and

NEW YORK STATE INSURANCE FUND,

ZURICH AMERICAN INSURANCE GROUP,

T.I.G. INSURANCE COMPANY (TRANSAMERICA)

and

RELIANCE INSURANCE COMPANY, in Liquidation
Carriers

Appearances:

Jorden N. Pedersen, Esquire
For the Claimant

John E. Kawczynski, Esquire
For New York State Insurance Fund

Frank J. Malagraca, Esquire
For Zurich American Insurance Group

Marck Kolber, Esquire
For T.I.G. Insurance Company/Transamerica

Matthew Weerth, Esquire
Cory Zimmerman, Esquire
For Reliance Insurance Company, in Liquidation

Before: RALPH A. ROMANO
Administrative Law Judge

DECISION AND ORDER

This is a claim for workers' compensation benefits under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. Section 901 *et seq*., herein referred to as the "Act." This case was originally assigned to Administrative Law Judge Paul Teitler. After being rescheduled several times, this matter was reassigned to me on February 23, 2004 and the hearing was held before me in New York, New York on June 28, 2004.[1] At that time, all parties were given the opportunity to present evidence.

At the hearing, Claimant submitted 17 exhibits, New York State Insurance Fund ("State Insurance") submitted 5 exhibits and Zurich American Insurance ("Zurich") submitted 1 exhibit. These exhibits were all received into evidence. Reliance Insurance Company ("Reliance") was represented at the hearing but offered no evidence. After the hearing Claimant submitted 1 exhibit and Zurich submitted 4 exhibits.[2] They are herewith admitted.[3] Also a part of the record is a transcript from a brief hearing held before Judge Teitler regarding this matter on September 3, 2003. Post-trial briefs on behalf of the parties were to be filed by October 13, 2004.[4]

This decision is rendered after having given full consideration to the entire record, the arguments of the parties and the applicable law.

STIPULATIONS AND ISSUES

The parties stipulated that they are subject to the Act. (Tr. at 7).

[1] The transcript of the hearing consists of 58 pages and will be cited as "Tr. at --."
[2] Zurich submitted only one exhibit at the hearing, namely the addendum to Dr. Friedman's supplemental report, which was marked as ZX-1. Zurich had previously submitted exhibits to Claimant's attorney and sent a copy of such to my office. One of these exhibits, namely the Notice of Controversion, was marked ZA EX-1. I therefore will refer to the Notice of Controversion as "ZA EX-1," but will refer to Zurich's remaining exhibits simply as "ZX-2" through "ZX-5."
[3] Claimant's exhibits will be cited as "CX-1" through "CX-18." State Insurance's exhibits were labeled as "EX-1" through "EX-5," and will be cited as such.
[4] Claimant's brief will be cited as "CB at --." Zurich's brief will be cited as "ZB at --." There were other briefs filed in this matter by the Superintendent of Insurance for the State of New York (on behalf of Reliance, which is in liquidation) and State Insurance, which are not cited herein.

The threshold issue is who the responsible employer and carrier are. The record suggests that Claimant was a union worker and while technically he could have worked for numerous employers in a short period of time, he actually did most of his work as a longshoreman for John P. Picone, Inc. ("Picone"). The confusion arises from the fact that Picone had different insurance carriers for different job sites at which Claimant worked, including Reliance, TIG and State Insurance. Also, Claimant's last job assignment was not for Picone, but instead was for Picone/McCullagh Joint Venture ("the Joint Venture"), which had its own insurance carrier, Zurich, thus adding two more parties to this case.

Other issues presented for my resolution include: (1) nature and extent of Claimant's disability and (2) whether Zurich, if found to be the responsible carrier, is entitled to relief under § 8(f) of the Act.

Average weekly wage ("AWW") is not an issue here, as Claimant contends that his AWW is $1,310.31 and Zurich stipulated to such, Reliance was willing to stipulate to it provided that proper documentation was shown and State Insurance offered "no position one way or the other." (Tr. at 15-17).

SUMMARY OF THE EVIDENCE

Alfred Lagstrom, an underwriter for the New York State Insurance Fund, testified briefly before Judge Teitler on September 3, 2003. Eric Bjonees ("Claimant") and his wife testified before me at the hearing on June 28, 2004.

The evidence also consists of deposition testimony of Dr. Jeffrey Nahmias and the reports of Dr. Mesick, Dr. Hutt and Dr. Friedman. Notes taken by various doctors at Mount Sinai Medical Center are also in evidence.

The vocational evidence consists of the report of Dr. Cipko and the report of Dr. Kincaid.

Further, Zurich's application for § 8(f) relief with attached exhibits;[5] the State Insurance Fund policy, excluding LaGuardia Airport as a covered location; and a letter from Risk Management to the District Director of the Office of Workers' Compensation Programs, identifying T.I.G. as the insurance carrier after August 15, 2000, are in evidence.

FINDINGS OF FACT

Testimony of Claimant and his Wife

Claimant is 50 years of age and lives in New Jersey with his wife, Brenda. (Tr. at 17-18). He left high school after three years and later obtained a GED. In 1985, Claimant began his longshoreman career by working as a dock builder and worked in that capacity until 2001, when he developed the present illnesses. (Tr. at 19). Claimant testified that his duties as a dock builder included all phases of construction, including carpentry duties, metal work and pile driving. (Tr.

[5] This application was marked for identification as ALJ-4 and was admitted into evidence at the formal hearing. (Tr. at 11).

at 20). He belonged to Local 1456 of the Carpenter's Union, and therefore worked for various employers, but Claimant testified that he worked for Picone for the majority of his career and engaged in pile driving, foundation work, welding, carpentry and demolition. (Tr. at 19-20). Claimant used various tools and machines in performing this work, including hand tools, circular and chain saws, welding machines and cranes. (Tr. at 21).

Claimant testified that as a result of his working conditions, which he described as being dusty most of the time, he breathed in "[e]poxies, welding fumes, diesel exhaust, gasoline exhaust, concrete dust, cutting concrete, [and] various solvents" on a daily basis. (Tr. at 22-23). Claimant also testified that he engaged in a process known as burning, which consists of burning metal with an oxyacetylene torch, causing contaminants from the metal to pollute the air. (Tr. at 23).

Claimant's last job location was Newtown Creek in Queens, New York, where he built a sanitation facility. This job required the use of a crane, vibratory hammer, oxyacetylene torch and shovels. Claimant testified that he was using the torch to burn organic material off of old steel sheets. (Tr. at 23-24). There were also fumes caused by using a vibratory hammer to install the new sheets, which were covered in epoxy, according to Claimant's testimony. As Claimant recalls, he worked at Newtown Creek for less than a month. (Tr. at 25). Claimant testified that his pay checks from this job came from the Joint Venture. (Tr. at 31).

Before working at Newtown Creek, Claimant worked at Harbor Charlie in Brooklyn. (Tr. at 25). There, he installed a police marina, which required driving concrete piles, installing precast concrete and doing foundation work. He used many of the same tools that he described using at Newtown Creek. Besides being exposed to the dust created from general construction debris, Claimant was aware of breathing concrete dust and welding fumes while working at Harbor Charlie. (Tr. at 26).

Claimant testified that he worked at LaGuardia Airport between 1998 and the year 2000,[6] off and on, probably totaling about ten months to one year.[7] (Tr. at 28). There, Claimant removed steel reinforcement beams from beneath the runway, drilled holes, drove concrete piles and reinstalled the cast concrete beams. (Tr. at 28). This was done underneath the runway and the work space ranged from 4 to 10 feet in height. (Tr. at 29). Claimant testified that he also used an oxyacetylene torch at this job site, which created smoke and fumes and that he breathed those fumes in. (Tr. at 29). In addition, the air was full of sand and dust as a result of sandblasting that was occurring at the same time that Claimant was rebuilding the runway. (Tr. at 30).

Claimant began having breathing problems in 1999 and saw a doctor at that time. (Tr. at 31). His condition continued to worsen with the passage of time until finally on February 2, 2001, Claimant was having so much trouble breathing that he thought that he was having heart problems. He went to see Dr. Mesick, who Claimant described as "a neighborhood doctor," who

[6] Claimant initially testified that he worked "Off and on right into 2000," but then when asked, "Did you work at the LaGuardia [sic] in 2001?" he responded that he did. (Tr. at 28).

[7] Claimant's wife testified that she remembers Claimant working at LaGuardia for more than a total of ten months. (Tr. at 55, 56).

also has a specialty in pulmonary disease. Dr. Mesick hospitalized Claimant for testing (Tr. at 32) and later diagnosed Claimant with pneumoconiosis (Tr. at 44). Claimant testified that he still sees Dr. Mesick every 3 months and that the doctor had tried different treatment options, such as steroid treatment, but nothing was effective. (Tr. at 33). However, Claimant testified that Dr. Mesick does prescribe him Zoloft and Xanax for depression. (Tr. at 34). Claimant also saw various doctors at Mount Sinai Medical Center, where he was told that he had silicosis. (Tr. at 33-34).

Claimant's complaints at the time of the hearing were that he quickly loses his breath upon climbing stairs, running, continuous lifting, becoming excited or walking on an incline. (Tr. at 35). In addition, he testified that extreme whether conditions negatively affect his breathing. Claimant also complains of coughing and tightness in his chest. (Tr. at 36). He admits that he smoked from the time that he was 18 until five years ago when he began having breathing problems, and that he smoked about a pack or a pack and a half per day. (Tr. at 36-37).

Claimant testified on cross-examination that he was told that he developed silicosis as a result of breathing aerosolized concrete particles, or silica particles. (Tr. at 41). He testified that there was no sandblasting going on during the short time that he worked at Newtown Creek, that he did not drive concrete piles there and that he did not work with cement there. (Tr. at 42). Claimant also testified that in his opinion, he was last exposed to concrete dust, whether from sandblasting or cutting or driving concrete, while working at either Harbor Charlie or at LaGuardia, which ever job site he last worked on, although Claimant could not recall specifically which one of these sites he last worked at. (Tr. at 42). However, upon further questioning, Claimant recalled that at Newtown Creek, the steel sheets were being driven into the sand causing him to inhale sand dust particles and that he also breathed in diesel fumes. (Tr. at 46-47).[8]

In addition, Claimant testified on cross-examination that he was not sure whether he could perform some of the jobs identified as alternate employment because he had never tried to perform this type of work. (Tr. at 39-40). He also testified that some of these jobs were as much as 45 minutes away from his home by car and that he does not drive. (Tr. at 39-40).

Brenda Bjonees, Claimant's wife, also testified at the hearing. She testified that it was the LaGuardia Airport job that immediately preceded the Newtown Creek job. (Tr. at 52). She also testified that she remembers Claimant coming home from that job complaining about dust and fumes and the trouble that he was having breathing, and that he would come home with cement in his nose, teeth and ears. (Tr. at 52). Ms. Bjonees testified that her husband's exact words regarding the LaGuardia job were, "this job's going to kill me." (Tr. at 53).

Medical Evidence

[8] In addition, Claimant had already testified on direct examination that he was exposed to fumes caused by using a vibratory hammer to install epoxy-covered steel sheets.

As Claimant testified, he first sought treatment for his condition in February of 2001, at which time he went to visit Dr. Mesick. (Tr. at 32). In his February 16, 2001 report, Dr. Messick felt that Claimant was suffering from pneumonia and that pneumoconiosis could be ruled out, as could tuberculosis and malignancy. (EX-8). Dr. Mesick admitted Claimant to the hospital for treatment, including antibiotics, aerosol treatments and oxygen. Testing was ordered at that time and was performed by Raritan Bay Medical Center's Diagnostic Imaging Department. Based on these tests, the doctors found that Claimant suffered from fibrosis and also found mild emphysematous changes. (EX-8).

Dr. Jeffrey Nahmias testified by deposition on September 1, 2004 on behalf of Claimant. He is a pulmonary specialist who treats patients with lung disorders and occupational lung disorders. (CX-18 at 4-5). He examined Claimant only once, on August 1, 2001, at the direction of Claimant's attorney, at which time Claimant complained of shortness of breath, coughing, chest tightness, bronchospasm and nocturnal symptoms. (CX-18 at 5-7, 28). Dr. Nahmias also had occasion to review the results of radiological tests. (CX-18 at 7-8).

According to Dr. Nahmias, the chest x-ray performed on February 16, 2001 showed chronic fibrotic disease of the upper lobes and the CAT scan of the lungs showed changes in the upper lungs, creating a suspicion of tuberculosis or granulomatous disease. (CX-18 at 8). The doctor explained that fibrosis is scar tissue in the lungs that can have multiple causes, such as pneumoconiosis, asbestosis or sarcoidosis. (CX-18 at 8-9). He went on to explain that it is routine when a patient has severe fibrosis to determine whether there has been occupational exposure. He described Claimant's work as causing "copious amounts of exposure." (CX-18 at 9).

Dr. Nahmias testified that he reviewed the records of Mt. Sinai Hospital, in which Claimant was diagnosed as having silicosis and chronic obstructive pulmonary disease ("COPD"). (CX-18 at 11). The doctor explained that silica is nothing more than sand and that silicosis is a fibrotic lung disease caused by the inhalation of sand. (CX-18 at 11). Dr. Nahmias also explained that concrete dust contains significant amounts of silica. The doctor went on to testify that COPD is a disease that attacks the airways of the lung, which become inflamed and hyperactive, therefore causing difficulty in exhaling. (CX-18 at 11). Dr. Nahmias explained that COPD also has several causes, including smoking and exposure to various fumes, including welding fumes, diesel fumes and excessive dust. (CX-18 at 11-12). The doctor concluded that if Claimant was exposed to epoxy fumes, smoke from burning galvanized bolts, welding fumes, sand dust and diesel fumes, these substances would have a harmful effect on Claimant's pulmonary system and lungs and contribute to his silicosis and COPD. (CX-18 at 22-23). According to Dr. Nahmias, silicosis is a progressive disease and COPD will also get worse until an individual avoids exposure to the harmful substances that cause it. (CX-18 at 26-27).

Dr. Nahmias testified that he performed a spirometry of Claimant, which is a test that measures expiratory flow and how much air a patient can blow out. (CX-18 at 12-13). The doctor found that Claimant suffers a severe limitation of airflow and a restrictive ventilatory defect, which is due to the restricted full lung expansion caused by the fibrotic tissue within the lungs that can be seen on the x-ray. (CX-18 at 14-15). Dr. Nahmias opined that the fibrotic changes in Claimant's lungs were caused by inhalation of silica particles. (CX-18 at 16).

Dr. Nahmias also found that Claimant has an obstructive component to his restrictive defect, which is caused by COPD. (CX-18 at 16). He explained that the obstruction refers to an inflammation of the bronchial tubes, causing them to narrow and therefore restrict airflow. (CX-18 at 16-17). When asked to diagnose Claimant, Dr. Nahmias responded:

> …the patient has definite silicosis -- better known as pneumoconiosis -- secondary to the silica inhalations while he was working at his job, which he previously described through sandblasting and concrete cutting, resulting in the severe fibrotic ventilatory defects. He also has some obstructive components secondary to a few factors, smoking being one factor, he did smoke, and inhalation of welding fumes and inhalation of diesel fumes contributing as well to the obstructive portion of his lung disease.

(CX-18 at 17).

Dr. Nahmias opined that Claimant's condition is definitely permanent and that he is not capable of returning to his usual employment. (CX-18 at 18). In his opinion, Claimant is capable of performing a sedentary job, but it would have to be in a clean, sterile environment that contains no dust, fumes or silica and he would have to be sheltered from hot and cold weather. (CX-18 at 18). In addition, the doctor felt that Claimant was likely to miss a lot of work, especially on hot, humid days and very cold days. (CX-18 at 20).

On cross-examination, Dr. Nahmias testified that silicosis is the primary disabling condition. (CX-18 at 29). He admitted that smoking may have made Claimant's condition worse, but only as to the COPD. (CX-18 at 31). He stated further that he is not able to determine what percentage of Claimant's condition was caused by smoking, but would consider the fact that he smoked somewhat contributory. (CX-18 at 31). Dr. Nahmias also testified that the symptoms of COPD evident on the radiological reports probably appeared weeks or months before February 16, 2001, when the x-ray and CAT scan were taken. (CX-18 at 35-36).

Dr. Nahmias wrote a report following his August 1, 2001 examination of Claimant, which is also in evidence. (CX-10). That report details much of the information offered at the deposition, including Claimant's chief complaints, diagnosis, suspected cause of Claimant's conditions and the doctor's recommendation that Claimant avoid future exposure to fumes, dust, asbestos and silica particles. In this report, Dr. Nahmias also opined that Claimant must not resume smoking. (CX-10).

Dr. Douglas Hutt, who is Board-certified in pulmonology and critical care management, examined Claimant on September 13, 2001.[9] Dr. Hutt opined that Claimant most likely does have silicosis, based on the chest x-ray, although no biopsy was performed. He also found that Claimant suffers from airflow obstruction, which could be related to Claimant's smoking, although Dr. Hutt agreed with Dr. Nahmias that smoking could not cause silicosis, and instead that was a result of his occupation. (EX-3).

[9] It appears from the record that Dr. Hutt performed this examination at the recommendation of Dr. Cipko, the vocational expert for State Insurance. In his first report, Dr. Cipko stated, "A medical evaluation of Mr. Bjonees has been arranged to determine his current status. The evaluation will be performed by Dr. Douglas Hutt." (EX-2). In addition, Dr. Hutt's report is addressed to Dr. Cipko. (EX-3).

Dr. Hutt opined that Claimant could work at a job where there would be no negative exposure and exercise or activity would be limited. Dr. Hutt also realized that silicosis is a progressive disease and that Claimant should be reevaluated on a regular basis. Finally, Dr. Hutt opined that Claimant has reached maximum medical improvement ("MMI") since his condition was likely to decline instead of improve over time. (EX-3).

Zurich referred Claimant to Dr. Carl Friedman, who examined Claimant on August 29, 2002. (CX-12). Dr. Friedman was able to review the radiological reports and other tests that Claimant had undergone prior to the examination, along with the reports of other doctors who had previously examined Claimant. Upon reviewing such information and obtaining a history, Dr. Friedman diagnosed Claimant as having silicosis; progressive, massive fibrosis; chronic obstructive pulmonary disease and chronic irritative bronchitis. He opined that Claimant has a permanent, partial disability, which he described as "moderate to marked." Dr. Friedman agreed that Claimant's condition is a result of his exposure to irritants. He agreed that Claimant is unable to return to usual employment and reasoned that Claimant will never reach MMI because silicosis is a progressive disease. (CX-12).

Dr. Friedman prepared a supplemental report in July of 2003, after reviewing the Claimant's deposition and a Med Control note. He then concluded that Claimant was exposed to dust while working at the Newtown Creek job, caused by building fumes and epoxy. In addition, Dr. Friedman opined that the chronic obstructive lung disease was caused in part by dust exposure and in part by smoking. Claimant's development of pneumoconiosis was attributed to silica exposure and the massive fibrosis deemed a complication of silicosis. However, Dr. Friedman opined that Claimant's disability is materially and substantially greater because of the history of cigarette smoking. (CX-15).

Dr. Friedman submitted an addendum to his supplemental report on January 9, 2004. The addendum did not indicate that Dr. Friedman saw Claimant again or reviewed additional records that led him to the additional conclusions made within. Yet, the doctor stated in the addendum that he believed 50 percent of Claimant's disability is attributable to cigarette smoking and 50 percent is attributable to silica exposure. (ZX-1).

The record also contains evidence that Claimant was treated at Mount Sinai Medical Center, where he was first diagnosed with silicosis and COPD on March 11, 2001. He was treated by several different doctors at Mount Sinai, all of whom opined that Claimant was totally disabled. (CX-11).

Vocational Evidence

State Insurance had Dr. Robert Cipko, a licensed psychologist and clinical/vocational supervisor, evaluate Claimant. (EX-2). Dr. Cipko described Claimant as "cooperative and friendly," and in fact, Claimant did admit to Dr. Cipko that he felt capable of lifting up to 20 pounds, walking for periods of 30 minutes and stooping and bending. Claimant told Dr. Cipko that he would like to return to his usual employment and that although he had not made any employment inquiries, he was willing to go on job interviews. (EX-2).

Dr. Cipko administered two tests to Claimant. First, the Wide Range Achievement Test (WRAT-3) was administered and showed that Claimant functions above high school level in reading and spelling but functions on only a fifth grade math level. The second test, the Myers-Briggs Type Indicator (MBTI) showed that Claimant has a preference for professions such as attorney, scientist, researcher, engineer and photographer. (EX-2)

In his initial report, Dr. Cipko noted that Dr. Rodgers had opined that Claimant was unable to return to his regular employment. In his addendum report, he noted that Dr. Hutt opined that Claimant was unable to return to his usual employment but was able to do sedentary work, but must be limited as to exposure to dust or fumes and the amount of exertion required. (EX-3).

Following his receipt of Dr. Hutt's report, Dr. Cipko performed a labor market survey. (EX-4). Dr. Hutt then approved six of the positions that Dr. Cipko identified, which included Order Clerk, Cashier, Appointment Setter and Receptionist/Clerk. Dr. Cipko's report includes the employer's name, wage range, classification (sedentary), and date available for each position. Although not listed in his report, the duties associated with each position were noted to Dr. Hutt and are a part of the record (EX-4). Each job entailed some degree of clerical work, including scheduling, answering phones, record keeping and filing. All six of these positions were full-time positions and the average hourly wage was calculated to be between $7.25 and $7.92. (EX-4).

A second vocational evaluation and earning capacity analysis of Claimant was performed by Dr. Charles Kincaid, a licensed rehabilitation counselor and certified vocational rehabilitation counselor. (CX-14). In conducting his evaluation and analysis, Dr. Kincaid considered the medical evidence of Dr. Platt, Dr. Nahmias, Dr. Hutt and the various doctors who treated Claimant at Mount Sinai. (CX-14).

Dr. Kincaid determined Claimant's work history includes working as a dock builder and as a tree trimmer, both which were identified as physically demanding jobs. It was determined that Claimant reads at a post-high school level, spells at an eighth grade level and is on a seventh grade math level.[10] The Wonderlic Personnel Test indicated that Claimant is of high general intelligence, fit for managerial level jobs or upper level clerical positions. However, Claimant did not perform well on the Minnesota Clerical Test; he scored in the fifth percentile in number comparison and the twentieth percentile in name comparison. In the Self-Directed Search test, Claimant scored highest in the realistic scale, indicating interest in skilled trades, technical and service occupations. He scored considerably lower on the other five scales. (CX-14).

Dr. Kincaid took into account several medical restrictions that were placed on Claimant's ability to work. He noted that Claimant can perform only sedentary work and that he is not able to perform a job that requires physical exertion, climbing, walking or working at heights. In addition, Dr. Kincaid found that Claimant cannot work in cold or wet conditions or in an environment that presents inhalation hazards. (CX-14).

[10] This information was obtained through the performance of the WRAT-3, the same test that State Insurance's vocational expert used, but I note that the results differed to some degree.

Using the McCroskey Transferable Skills Program,[11] Dr. Kincaid determined that prior to developing pneumoconiosis and COPD, Claimant's profile matched 127 jobs of the 1, 250 jobs that are most often hired for in the county where Claimant resides. However, following the development of these medical conditions, and taking into account their effect on Claimant, Claimant's profile matched only 1 of the 1, 250 jobs most commonly hired for. In Dr. Kincaid's words, "[t]his is indicative of a virtual elimination of personal access to the local labor market pre- vs. post-injury." According to Dr. Kincaid's report, Claimant expressed interest in receiving vocational rehabilitation and Dr. Kincaid referred him to such a service. Dr. Kincaid also opined that an electric scooter or wheelchair would help Claimant to move about and improve his daily functioning and job performance. (CX-14).

Dr. Kincaid reviewed Dr. Cipko's recommendations and opined that Claimant should not work in a clerical capacity based on his test results and vocational interests. Dr. Kincaid did feel that "with re-training, [Claimant] would be capable of returning to work within his residual functional capacities." (CX-14).

Insurance Evidence

On September 3, 2003, Alfred Lagstrom testified on behalf of State Insurance before Judge Teitler.[12] Mr. Lagstrom testified that he is an underwriter for State Insurance and has been so employed since May of 2002. (Lagstrom at 5-6). According to Mr. Lagstrom, State Insurance never issued a policy to the Joint Venture. (Lagstrom at 7). The witness also explained that although State Insurance did insure Picone, certain operations were excluded, and one such excluded location was LaGuardia Airport. (Lagstrom at 7). According to Mr. Lagstrom's testimony, the LaGuardia project was insured by Reliance Insurance Company by virtue of a policy that began on January 1, 2000 and was terminated on April 1, 2001. (Lagstrom at 9-12).

State Insurance also introduced into evidence a copy of three insurance policies that collectively provided insurance to Picone from March 1, 1998 until March 1, 2001. (EX-5). The policy providing coverage from March 1, 1998 until March 1, 1999 lists LaGuardia Airport, contract number LGA 124067, as an excluded location and lists Reliance National Indemnity Company as the insurer for that location. (EX-5). The second policy, covering the period between March 1, 1999 and March 1, 2000 and the third policy, providing coverage from March 1, 2000 until March 1, 2001, both exclude the aforementioned project at LaGuardia in addition to another LaGuardia project, identified as contract number LGA 124068. This project was also insured by Reliance, according to State Insurance's records. (EX-5).

Also in evidence is a letter from Risk Management's representative to the District Director. This letter explains that Risk Management had previously handled Claimant's prior workers' compensation case, but that this claim arose in the Jamaica Bay section of LaGuardia Airport, and at the time, Risk Management was handling the Port Authority wrap-up policy on

[11] This program "matches and compares worker capacities against the demands of jobs to determine where the two intersect," and it is noted for its high degree of validity and reliability, according to Dr. Kincaid. (CX-14).
[12] The transcript of the hearing consists of 18 pages and will be cited as "Lagstrom at --."

behalf of Reliance. However, according to Risk Management, T.I.G. took over the Port Authority wrap-up program on August 15, 2000, making Reliance no longer liable. Risk Management no longer represents Reliance, as it is barred from doing so since Reliance is in liquidation. Further, this letter states that Risk Management is responsible only for the Port Authority wrap-up program and has no involvement with the Picone/McCullaugh joint venture. (EX-5).

DISCUSSION

I. The Joint Venture is the responsible employer and Zurich is the responsible carrier.

Claimant contends that Newtown Creek is the last job site where he was exposed to substances that contributed to his occupational disease, and that the Joint Venture is therefore the responsible employer and Zurich the responsible carrier. (CB at 10-14). Zurich argues that Claimant was not exposed to injurious industrial materials in quantities that would be sufficient to potentially cause silicosis or COPD while working at the Newtown Creek job site, and therefore that neither the Joint Venture nor Zurich is liable to Claimant under the Act. (ZB at 4-10). Zurich relies on *Justice v. Newport News Ship Building*, BRB #: 99-1087(07/19/00); *Todd Shipyard's Corp. v. Black*, 717 F.2d 1280 (9th Cir. 1983), *cert. denied*, 466 U.S. 937 (1984); and *Druscovich v. Todd Pacific Shipyard Corp.*, BRB #: 92-2030 (06/21/96) to support its position.

Zurich cites *Justice v. Newport News*, because in that case, the BRB cited *Todd v. Black* for the proposition that the last employer "to expose the employee to injurious stimuli *in sufficient quantities to have the potential to cause the employee's occupational disease*" is the liable employer. *Justice v. Newport News*, BRB #: 99-1087. (emphasis added). However, *Todd v. Black*[13] is a 9th Circuit case that relies upon *Traveler's Insurance Company v. Cardillo*, 225 F.2d 137 (2d Cir. 1955), *cert. denied*, *Ira S. Bushey & Sons, Inc. v. Cardillo*, 350 U.S. 913 (1955). *Cardillo* is a Second Circuit case in which the court examined the legislative history of the Act and found that Congress took into consideration that without a provision that distributes liability among all responsible employers, "a 'last employer' would be liable for the full amount recoverable, *even if the length of employment was so slight that, medically, the injury would, in all probability, not be attributable to that 'last employment'*." *Id.* at 145. (emphasis added). Since Congress chose not to remedy this result, the Second Circuit held that Congress intended to hold liable the last employer where the claimant was exposed to injurious stimuli and naturally, the carrier who insured that employer. *Id.* In addition, the Second Circuit concluded that the reason for such a rigid rule is to avoid the difficulties and delay that would otherwise occur in administering the Act.

Zurich also cites the BRB's decision in *Druscovich* for the proposition that the exposure must be to a *sufficient quantity* of the hazardous material. In *Druscovich*, the BRB cites to another Ninth Circuit case, in which the Ninth Circuit relies on its own decision in *Todd v. Black.*

[13] The holding in *Todd v. Black* extends the last responsible employer rule, but not in any way that is helpful to the resolution of the present case.

Although on its face the Ninth Circuit comports to agree with the Second Circuit, there are obvious differences in the law. The Second Circuit requires only exposure to the harmful stimuli that could cause the type of disease that the claimant suffers, while the Ninth Circuit requires that the claimant be exposed to a sufficient quantity of stimuli such that this employment actually could have caused the disease. The BRB has apparently chosen to adopt the Ninth Circuit's view. Being mindful that the present case arose in the Second Circuit and was tried there, I find that the mandated rule of law is as the Second Circuit has stated it.

Further, and apart from the foregoing finding, I find that Claimant last worked at the Newtown Creek job, where he was exposed to fumes caused by burning steel and using a vibratory hammer to install steel sheets that were covered in epoxy, according to his own testimony. In addition, Claimant recalled that he inhaled sand particles as he drove steel sheets into the ground while working at the Newtown Creek site, and that he was also exposed to diesel fumes while working there. Dr. Nahmias testified that if Claimant was exposed to epoxy fumes or sand dust that these substances would have contributed to his pulmonary disease. Therefore, because Claimant was exposed to injurious stimuli that likely contributed to his occupational disease, the Joint Venture is, in any event, the responsible employer and Zurich is the responsible carrier.

II. Claimant's condition is a result of his employment as a longshoreman.

I find that Claimant has established a *prima facie* case of causation as required under §20(a) of the Act. Section 20(a) states that Claimant must establish that he suffered a physical harm and that conditions existed at work which could have caused the harm or pain. *Kier v. Bethlehem Steel Corp.*, 16 BRBS 128 (1984). Once the *prima facie* case has been established, Claimant is entitled to the rebuttable presumption that the injury was caused by Claimant's employment. 33 U.S.C. §920(a).

The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment. *See* 33 U.S.C. §902(2). The Act does not require that the injury be traceable to a definite time. The fact that a Claimant's injury occurred gradually over a period of time as a result of continuing exposure to conditions of employment is no bar to a finding of an injury within the meaning of the Act. *Bath Iron Work Corp. v. White*, 584 F.2d 569 (1st Cir. 1978). Also, if an employment injury aggravates, exacerbates, accelerates, contributes to or combines with a previous infirmity, disease, or underlying condition, the resultant disability is compensable. *See Wheatley v. Adler*, 407 F.2d 307 (D.C. Cir., 1968); *Independent Stevedore Company v. O'Leary*, 357 F.2d 812; *Tasinski v. ITO Corporation of Baltimore*, 7 BRBS 1012, BRB Nos. 77-27/A (1978); *Jacobs v. WMATA*, 7 BRBS 421 BRB No. 77-116 (1978); *Corcoran v. Preferred Stone Setting*, 12 BRBS 201, BRB No. 78-528 (1980).

Once the claimant has invoked the §20(a) presumption, the employer may rebut it upon a showing of substantial countervailing evidence which proves that the injury was not causally connected to Claimant's employment. 33 U.S.C. §920; *Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 1082, 4 BRBS 466, 475 (D.C. Cir.), *cert denied*, 429 U.S. 820 (1976). In that

circumstance, the issue of causation must be resolved on the record as a whole. *Frye v. Potomac Electric Power Company*, 21 BRBS 194, 196 (1988).

Zurich has conceded that Claimant suffers from silicosis and COPD, and that the silicosis was caused by occupational exposure to injurious fumes and dusts. In addition, Zurich concedes a partial causal relationship for the COPD due to occupational exposure. (ZB at 4). Thus, Claimant has met its burden by showing that his employment, at the least, "aggravated, exacerbated, accelerated, contributed to or combined with a previous infirmity, disease, or underlying condition to cause the present disability." I therefore find that Claimant has invoked the §20(a) presumption and Zurich has presented no evidence to rebut it.

III. Claimant reached permanency on March 1, 2001, the date that he was diagnosed with silicosis and COPD.

A claimant is permanently disabled if after reaching maximum medical improvement, he has a residual disability. *Louisiana Insurance Guaranty Association v. Abbott*, 40 F.3d 122, 125 (5th Cir. 1994). However, an irreversible medical condition is permanent per se. *Drake v. General Dynamics Corp.*, 11 BRBS 288, 290 n.2 (1979). The date that an irreversible medical condition is diagnosed is the date of permanency. *Crouse v. Bath Iron Works Corp.*, 33 BRBS 442 (ALJ) (1999).

The medical evidence establishes that both silicosis and COPD are irreversible medical conditions. Dr. Nahmias testified that silicosis is a progressive disease and that COPD will continue to worsen until an individual is no longer exposed to the harmful substances that cause it and Dr. Hutt and Dr. Friedman both characterized silicosis as a progressive disease, also. Thus, since Claimant was first diagnosed with these conditions on March 1, 2001, I find that this is the date of permanency.[14]

IV. Because suitable alternate employment was not established, Claimant suffers from a total disability.

To establish a prima facie case of total disability, the employee must show that he is unable to return to his usual employment due to his injury. If the claimant establishes a prima facie case, the burden shifts to the employer, who must then show that suitable alternative employment exists. *Clophus v. Amoco Prod. Co*., 21 BRBS 261 (1988); *Nguyen v. Ebbtide Fabricators*, 19 BRBS 142 (1986).

The employer meets this burden by identifying specific jobs in the local community that are available to the claimant. *Armfield v. Shell Offshore, Inc*., 30 BRBS 122, 123 (1996). The employer also must show that claimant could perform such jobs given his age, education, work experience and physical restrictions. *Edwards v. Director*, OWCP, 99 F.2d 1374 (9th Cir. 1993); *cert*. *denied*, 511 U.S. 1031 (1994). The factfinder is to determine the claimant's restrictions based on the medical evidence and decide whether the claimant is capable of performing the jobs identified by the employer. *Villasenor v. Marine Maintenance Indus.*, 17 BRBS 99 (1985). The employer must show that the job opportunities are realistic and does so by establishing the

[14] This diagnosis was made by Drs. Wilk-Rivard and Limratana of Mount Sinai Medical Center. (CX-11).

nature, availability and terms of the employment. *Thompson v. Lockheed Shipbuilding & Constr. Co.*, 21 BRBS 94, 97 (1988).

If the employer meets this burden, the claimant must then prove that he has made a diligent attempt to secure employment. *Palombo v. Director,* OWCP, 937 F.2d 70; 25 BRBS 1 (CRT) (2nd Cir. 1991).

It is undisputed that Claimant is not able to return to his pre-injury employment. Therefore, he has established a prima facie case of total disability. The burden is then on Zurich to establish suitable alternate employment.

I find, based on the medical evidence, that Claimant must work in a sterile environment performing sedentary work and that he is restricted to working inside, in a controlled climate.

Although Dr. Cipko has established job openings in the community which Claimant could likely perform given his physical restrictions, the law dictates that the employer identify jobs that the claimant can perform given his skill, education and work experience. Claimant has spent his adult life working as a dock builder, with the exception of a few years that he spent as a tree climber after leaving high school. His experience lies in heavy maintenance.

Each job that Dr. Cipko identified in his labor market survey is clerical in nature. It is clear from Claimant's work history and from the results of the vocational testing administered by Dr. Kincaid that Claimant does not possess the skills necessary to perform clerical work. Although Dr. Cipko did not document the qualifications that each job vacancy required, the record does contain a list of duties that each job entails, and based on those duties, I find that Claimant is incapable of performing the work identified by Dr. Cipko, as each position required the performance of clerical duties, such as record keeping, scheduling and filing. As Claimant's expert Dr. Kincaid opined, Claimant is not suited to work in a clerical capacity and should undergo vocational counseling in order to be able to secure suitable alternate employment.

Since Zurich did not identify any work that Claimant was capable of performing given his physical restrictions and mental capabilities, I find that Claimant is totally disabled.

V. Zurich is not entitled to relief from the special fund because the Joint Venture did not have notice of Claimant's preexisting disability.

Zurich has submitted an application to limit its liability pursuant to Section 8(f) of the Act. (ALJ-4). In its brief, Zurich argues that "[i]t is quite clear that for the two years prior to the claimant's last day worked, he was suffering from pulmonary dysfunction including emphysema from cigarette smoking and fibrotic changes." (ZB at 11).

Congress provided for a Special Relief Fund under the Act to address employers' reservations regarding hiring and retaining handicapped persons, namely a fear that they are more prone to injury than the general population. See *Director, Office of Workers' Compensation Programs v. Campbell Industries, Inc.*, 678 F.2d 836 (9th Cir. 1982), *cert. denied*, 459 U.S. 1104 (1983). Section 8(f) limits an employer's liability to a maximum of 104 weeks. 33 U.S.C.A. § 908(f). To be eligible for such relief, an employer must prove that the present

disability was caused in part by a pre-existing condition. *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co.*, 6765 F.2d 110, 112 (4th Cir. 1982). In order to make such a showing, the employer must prove three necessary elements: (1) the Claimant had an existing permanent partial disability (2) which was manifest to the employer and (3) the combination of the pre-existing permanent disability and the subsequent work-related injury resulted in a greater degree of permanent disability. *Id*. at 114; *See*, *McDuffie v. Eller & Co.*, 10 BRBS 685 (1979).

Disability for purposes of Section 8(f) encompasses those cases in which a Claimant has a serious lasting physical disability which would motivate a cautious employer to dismiss him because of a greatly increased risk of an employment-related accident and compensation liability. *C & P Telephone Co. v. Director, OWCP*, 564 F.2d 503, 514 (D.C. Cir. 1977). A medical condition need not cause economic disability to constitute a pre-existing permanent partial disability within the meaning of Section 8(f). *Id*., 564 F.2d at 512. However, an employer must show not merely that the employee was previously injured, but that the injury was in fact disabling. *Director, OWCP v. Belcher Erectors*, 770 F.2d 836 (9th Cir. 1982), *cert. denied,* 459 U.S. 1104 (1983). In addition, the BRB has held that where a claimant was previously exposed to silica and continued to be, any disease that results is one injury and thus there is no pre-existing condition and therefore no relief from the Special Fund is available. *Stokes v. Jacksonville Shipyards*, 18 BRBS 237 (1986), *aff'd Jacksonville Shipyards v. Director, OWCP*, 851 F.2d 1314 (1988).

Zurich argues that Claimant was disabled due to prior breathing problems that had existed for at least 2 years prior to Claimant working for the Joint Venture and that these problems were largely a result of Claimant's smoking. The evidence does show that Claimant smoked between a pack and a pack and a half of cigarettes per day for 28 years and that smoking was a contributing factor to his development of COPD. However, it is uncontradicted that silicosis resulted from Claimant's occupation alone, and therefore silicosis cannot be considered a pre-existing condition for purposes of § 8(f) relief.

Employer's burden is to show that Claimant had a disability prior to beginning work for the Joint Venture, and Zurich points to Claimant's COPD and the fact that it was caused in part by smoking to satisfy that burden. Absent any argument to the contrary, and because the record does establish that Claimant's conditions were present before he began working for the Joint Venture, I find that Claimant did have a pre-existing partial disability.

The manifest requirement is not a statutory requirement of § 8(f) but was judicially added and it has been contained in the regulations since 1985. *See* 20 C.F.R. § 702.321(a). If the employer had actual knowledge of the pre-existing condition prior to the subsequent injury, the manifest requirement will be deemed met. *Director v. Universal Terminal & Stevedoring Corp.*, 575 F.2d 452 (3d Cir. 1978).

Zurich argues that the employer had notice of Claimant's preexisting breathing problems and in support of this argument points to testimony of the Claimant, presumably from his deposition, which is not in evidence.[15] (ZB at 16). In addition, Zurich relies on the fact that

[15] Zurich refers to this testimony as "claimant's minutes from May 2, 2003." The only testimony of Claimant that is in evidence is from the formal hearing, which was held on June 28, 2004.

while working at LaGuardia, Claimant told his employer there that "you are killing everyone down there." (ZB at 16). However, the employer at LaGuardia was Picone, which is a distinct employer from the Joint Venture. Thus, this remark by Claimant did not serve as notice to the Joint Venture.

As to the final element of Section 8(f), that the pre-existence of a partial disability combined with the subsequent employment-related injury to produce a greater degree of permanent disability, it has been held that the second injury must not, in and of itself, be totally disabling. *Director, OWCP v. Luccitelli*, 964 F.2d 1303, 1306 (2d Cir. 1992). Before 1972, the statute required a permanent partial disability which "combined with" a previous disability to cause a permanent total disability. 33 U.S.C. § 908(f) (1972). In 1972, the language was changed to indicate that the current level of disability must be found not to be "due solely to the most recent injury." 33 U.S.C. § 908(f) (1972). Thus it is not enough to show that the preexisting disability makes the overall total disability greater. *E.P. Paup Co. v. Director, OWCP*, 999 F.2d 1341, 27 BRBS 41 (CRT) (9th Cir. 1993).

Zurich argues that the medical evidence supports a finding that Claimant's disability is substantially greater due to the fact that he smoked. Dr. Nahamias testified that he was unable to determine how much of Claimant's disability was due to cigarette smoking and how much was due to occupational dust. Dr. Friedman, on the other hand, opined that smoking caused 50 percent of Claimant's disability. Therefore, I find that Claimant had a preexisting disability, which resulted from smoking, opposed to resulting solely from occupational exposure, and that Claimant's current level of disability would not be as great absent his development of COPD.

Based on the foregoing, I find Zurich's arguments insufficient to establish that it is entitled to relief pursuant to § 8(f), only because Zurich failed to prove that the Joint Venture had notice of Claimant's preexisting disability.

VI. Claimant's attorney is entitled to a fee for successfully prosecuting this claim.

Claimant's attorney, having successfully prosecuted this claim, is entitled to a fee to be assessed against the Employer. Claimant's attorney has not submitted his fee application. Within 14 days of the receipt of this Decision and Order, he shall submit a fully supported and fully itemized fee application, sending a copy thereof to the Employer's counsel who shall then have 10 days to comment thereon. The postmark shall determine the timeliness of any filing. I will consider only those legal services rendered after the date of referral to this office. Services performed prior to that date should be submitted to the District Director for his consideration.

ORDER

On the basis of the foregoing the Joint Venture shall:

(1) Pay Claimant compensation benefits for total temporary disability from February 3, 2001 to February 28, 2001, based on Claimant's average weekly wage of $1,310.31.

(2) Pay Claimant total permanent disability benefits from March 1, 2001 to the present and continuing, based on Claimant's average weekly wage of $1,310.31.

(3) Pay Claimant all medical benefits under Section 7 of the Act.

(4) Pay Claimant's costs and attorney fees, to be established by separate order.

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RALPH A. ROMANO
Administrative Law Judge